STATE OF MICHIGAN
IN THE SUPREME COURT

MARY ANN HEGADORN,

Plaintiff-Appellant,

v

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendant-Appellee.
_____/

Supreme Court No. 156132

Court of Appeals No. 329508

Livingston Circuit Court
No. 2014-028394-AA

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

ESTATE OF DOROTHY LOLLAR, by DEBORAH D. TRIM, Personal Representative,

Plaintiff-Appellant,

v

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendant-Appellee.
_____/

Supreme Court No. 156133

Court of Appeals No. 329511

Livingston Circuit Court
No. 2014-028395-AA

ROSELYN FORD,

Plaintiff-Appellant,

v

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendant-Appellee.
_____/

Supreme Court No. 156134

Court of Appeals No. 331242

Washtenaw Circuit Court
No. 2015-000488-AA

DEPARTMENT OF HEALTH AND HUMAN SERVICES' ANSWER TO APPLICATION FOR LEAVE TO APPEAL

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COUNTER-STATEMENT OF JURISDICTION

On July 13, 2017, Medicaid Claimants Mary Ann Hegadorn, Dorothy Lollar, Roselyn Ford, and their spouses, Ralph Hegadorn, Dallas Lollar, and Herbert Ford filed an application for leave to appeal their consolidated cases. The unpublished per curiam opinion of the Michigan Court of Appeals was issued on June 1, 2017. The Court of Appeals approved publication of the opinion on July 27, 2017. The Supreme Court has jurisdiction over the application. MCL 600.232; MCR 7.303(B)(1).

COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Whether the Court of Appeals erred when it concluded that 42 USC 1396p(d) governs the treatment of trust assets for any individual whose assets must be counted for a Medicaid eligibility determination.

   Appellants' answer: Yes

   Department's answer: No

   Administrative Law Judge answer: No

   Circuit court's answer: Yes

   Court of Appeals' answer: No

2. Whether the Department erred in adjusting implementation of the procedure for evaluating certain trusts to bring it into compliance with federal law, federal regulation, and its own written policy.

   Appellants' answer: Yes

   Department's answer: No

   Administrative Law Judge answer: No

   Circuit court's answer: Yes

   Court of Appeals' answer: No

3. Whether the Court of Appeals erred when it concluded that individuals with excess assets were not entitled to receive Medicaid benefits based on the Department's previous, erroneous interpretation of state and federal authority.

   Appellants' answer: Yes

   Department's answer: No

   Administrative Law Judge answer: No

   Circuit court's answer: Yes

   Court of Appeals' answer: No

STATUTES AND RULES INVOLVED

42 USC § 1396p. Liens, adjustments and recoveries, and transfers of assets.

(c) Taking into account certain transfers of assets [Divestments]

(1) (A) . . . the State plan must provide that if an institutionalized individual or the spouse of such an individual (or, at the option of a State, a noninstitutionalized individual or the spouse of such an individual) disposes of assets for less than fair market value on or after the look-back date specified in subparagraph (B)(i), the individual is ineligible for medical assistance … during the period beginning on the date specified in subparagraph (D) and equal to the number of months specified in subparagraph (E).

. . . .

(2) An individual shall not be ineligible for medical assistance by reason of paragraph (1) to the extent that—

> **(A)** the assets transferred were a home and title to the home was transferred to
>
> > **(i)** the spouse of such individual.
> >
> > . . . .
>
> **(B)** the assets—
>
> > **(i)** were transferred to the individual's spouse or to another for the sole benefit of the individual's spouse;
> >
> > **(ii)** were transferred from the individual's spouse to another for the sole benefit of the individual's spouse.

. . . .

(d) Treatment of trust amounts

(1) For purposes of determining an individual's eligibility for, or amount of, benefits under a State plan under this subchapter, subject to paragraph (4), the rules specified in paragraph (3) shall apply to a trust established by such individual.

(2)(A) For purposes of this subsection, an individual shall be considered to have established a trust if assets of the individual were used to form all or part of the corpus of the trust and if any of the following individuals established such trust other than by will:

(i) The individual;

(ii) The individual's spouse;

(iii) A person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse;

(iv) A person, including any court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.

(B) In the case of a trust, the corpus of which includes assets of an individual (as determined under subparagraph (A)) and assets of any other person or persons, the provisions of this subsection shall apply to the portion of the trust attributable to the assets of the individual.

(C) Subject to paragraph (4), this subsection shall apply without regard to—

(i) the purposes for which a trust is established;

(ii) whether the trustees have or exercise any discretion under the trust;

(iii) any restrictions on when or whether distributions may be made from the trust; or

(iv) any restrictions on the use of distributions from the trust.

(3)(A) In the case of a revocable trust—

. . . .

(B) In the case of an irrevocable trust—

(i) if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources

available to the individual, and payments from that portion of the corpus or income—

(I) to or for the benefit of the individual, shall be considered income of the individual; and

(II) for any other purpose, shall be considered a transfer of assets by the individual subject to subsection (c) of this section; and

(ii) any portion of the trust from which, or any income on the corpus from which, no payment could under any circumstances be made to the individual shall be considered, as of the date of establishment of the trust (or, if later, the date on which payment to the individual was foreclosed) to be assets disposed by the individual for purposes of subsection (c) of this section, and the value of the trust shall be determined for purposes of such subsection by including the amount of any payments made from such portion of the trust after such date.

. . . .

(h) Definitions

In this section, the following definitions shall apply:

(1) The term "assets," with respect to an individual, includes all income and resources of the individual and of the individual's spouse, including any income or resources which the individual or such individual's spouse is entitled to but does not receive because of action—

(A) by the individual or such individual's spouse;

(B) by a person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or such individual's spouse; or

(C) by any person, including any court or administrative body, acting at the direction or upon the request of the individual or such individual's spouse.

(2) The term "income" has the meaning given such term in section 1382a of this title.

(3) The term "institutionalized individual" means an individual who is an inpatient in a nursing facility, who is an inpatient in a medical institution and with respect to whom payment is made based on a level of care provided in a nursing facility, or who is described in section 1396a(a)(10)(A)(ii)(VI) of this title.

(4) The term "noninstitutionalized individual" means an individual receiving any of the services specified in subsection (c)(1)(C)(ii) of this section.

(5) The term "resources" has the meaning given such term in section 1382b of this title, without regard (in the case of an institutionalized individual) to the exclusion described in subsection (a)(1) of such section.

42 USC § 1396r-5. Treatment of income and resources for certain institutionalized spouses.

(a) Special treatment for institutionalized spouses

(1) Supersedes other provisions

In determining the eligibility for medical assistance of an institutionalized spouse (as defined in subsection (h)(1) of this section), the provisions of this section supersede any other provision of this subchapter (including sections 1396a(a)(17) and 1396a(f) of this title) which is inconsistent with them.

. . . .

(c) Rules for treatment of resources

(1) Computation of spousal share at time of institutionalization

(A) Total joint resources

There shall be computed (as of the beginning of the first continuous period of institutionalization)

(i) the total value of the resources to the extent either the institutionalized spouse or the community spouse has an ownership interest, and

. . . .

(2) Attribution of resources at time of initial eligibility determination

In determining the resources of an institutionalized spouse at the time of application for benefits under this subchapter, regardless of any State laws relating to community property or the division of marital property--

(A) except as provided in subparagraph (B), all the resources held by either the institutionalized spouse, community spouse, or both, shall be considered to be available to the institutionalized spouse, and

(B) resources shall be considered to be available to an institutionalized spouse, but only to the extent that the amount of such resources exceeds the amount computed under subsection (f)(2)(A) of this section (as of the time of application for benefits).

. . . .

(5) Resources defined

In this section, the term "resources" does not include—

(A) resources excluded under subsection (a) or (d) of section 1382b of this title, and

(B) resources that would be excluded under section 1382b(a)(2)(A) of this title but for the limitation on total value described in such section.

. . . .

(f) Permitting transfer of resources to community spouse

(1) In general

An institutionalized spouse may, without regard to section 1396p(c)(1) of this title, **transfer an amount equal to the community spouse resource allowance** (as defined in paragraph (2)), but only to the extent the resources of the institutionalized spouse are transferred to (or for the sole benefit of) the community spouse.

. . . .

(h) Definitions

In this section:

(1) The term "institutionalized spouse" means an individual who—

(A) is in a medical institution or nursing facility or who (at the option of the State) is described in section 1396a(a)(10)(A)(ii)(VI) of this title, and

(B) is married to a spouse who is not in a medical institution or nursing facility;

but does not include any such individual who is not likely to meet the requirements of subparagraph (A) for at least 30 consecutive days.

(2) The term "community spouse" means the spouse of an institutionalized spouse.

POMS SI 01120.201 [SSA Program Operating Manual System]

D. Policy–Treatment of Trusts

1. Revocable Trusts

a. General Rule Revocable Trusts

In the case of a revocable trust established with the assets of the individual, the entire corpus of the trust is a resource to the individual. However, certain exceptions may apply. (See SI 01120.203A.)

NOTE: The exceptions in SI 01120.203A only apply to counting a trust under the statutory provisions of section 1613(e) of the Act. A trust that meets the definition of a resource is still countable and must be developed under SI 01120.200.

b. Relationship to Transfer Penalty

Any disbursements from a trust that is a resource that are not made to, or for the benefit of the individual (SI 01120.201F.1.) are considered a transfer of resources. (See SI 01150.100 ff for transfer of resource provisions.)

c. Example

Willie Jones is a young adult with mental retardation. Mr. Jones had a revocable trust established after 1/1/00. All but $5,000 of funds in the trust had been spent on Mr. Jones' behalf. His mother files for SSI for him and is told that he is not eligible because of the money in the trust. His mother takes $4,500 of the money and makes a down payment on a new car that she says she will use to transport Mr. Jones. However, she registers the car in her own name. Even though his mother will use the car to transport Mr. Jones, the purchase of the car is a transfer of resources since the car does not belong to him. (See SI 01120.201F.1. for policy on purchases for the benefit of the individual and titling of property.)

2. Irrevocable Trusts

a. General Rule – Irrevocable Trusts

In determining whether an irrevocable trust established with the assets of an individual is a resource, we must consider how payments from the trust can be made. If payments from the trust could be made to or for the benefit of the individual or individual's spouse (SI 01120.201F.1.), the portion of the trust from which payment could be made that is attributable to the individual is a resource. However, certain exceptions may apply. (See SI 01120.203.)

b. Circumstance under which payment can or cannot be made

In determining whether payments can or cannot be made from a trust to or for the benefit of an individual (SI 01120.201F.1.), take into consideration any restrictions on payments. Restrictions may include use restrictions, exculpatory clauses, or limits on the trustee's discretion included in the trust. However, if a payment can be made to or for the benefit of the individual under **any** circumstance, no matter how unlikely or distant in the future, the general rule in SI 01120.201D.2.a. applies (i.e., the portion of the trust that is

attributable to the individual is a resource, provided no exception from SI 01120.203 applies).

c. Examples

- An irrevocable trust provides that the trustee can disburse $2,000 to, or for the benefit of the individual out of a $20,000 trust. Only $2,000 is considered to be a resource under SI 01120.201D.2.a. The other $18,000 is considered to be an amount which cannot, under any circumstances, be paid to the individual and may be subject to the transfer of resources rule in SI 01120.201E and SI 01150.100 ff.

- If a trust contains $50,000 that the trustee can pay to the beneficiary only in the event that he or she needs a heart transplant or on his/her 100th birthday, the entire $50,000 is considered to be a payment which could be made to the individual under some circumstance and is a resource.

- An individual establishes an irrevocable trust with $10,000 of his assets. His parents contribute another $10,000 to the trust. The trust only permits distributions to, or for the benefit of, the individual from the portion of the trust contributed by his parents. The trust is not subject to the rules of this section. The portion of the trust contributed by the individual is subject to evaluation under the transfer of resources rules in SI 01150.100 ff. (See also SI 01120.201E.) The portion of the trust contributed by his parents is subject to evaluation under SI 01120.200.

Bridges Eligibility Manual 401, p 1

[page 1]

. . . .

GENERAL DEFINITIONS

MA Only

These definitions apply to all trust policy. There are special definitions for Medicaid trusts.

Beneficiary - the person for whose benefit a trust is created.

Grantor or settlor - the person who established the trust. Any person who contributes to a trust is considered a grantor.

. . . .

[page 3]

. . . .

Use the following policies if the trust is a Medicaid trust:

- COUNTABLE ASSETS FROM MEDICAID TRUSTS.
- COUNTABLE INCOME FROM MEDICAID TRUSTS.
- TRANSFERS FOR LESS THAN FMV.

[page 4]

. . . .

Resources - all income and assets of a person and the person's spouse. It includes any income and assets the person or spouse is entitled to but does not receive because of action:

- By the person or spouse.
- By someone else (including a court or administrative body) with legal authority to act in place of or on behalf of the person or spouse.
- By someone else (including a court or administrative body) acting at the direction or upon the request of the person or spouse.

. . . .

[page 7]

A Medicaid trust is a trust that meets conditions 1 through 5 below:

1. The person whose resources were transferred to the trust is someone whose assets or income must be counted to determine MA eligibility, an MA post-eligibility patient-pay amount, a divestment penalty or an initial assessment amount. A person's resources include his spouse's resources (see definition).

2. The trust was established by:

- The person.
- The person's spouse.

- Someone else (including a court or administrative body) with legal authority to act in place of or on behalf of the person or the person's spouse, or an attorney, or adult child.

- Someone else (including a court or administrative body) acting at the direction or upon the request of the person or the person's spouse or an attorney ordered by the court.

3. The trust was established on or after August 11, 1993.

4. The trust was not established by a will.

5. The trust is **not** described in Exception A, Special Needs Trust, or Exception B, Pooled Trust in this item.

. . . .

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. . . .

Irrevocable Trust

Count as the person's countable asset the value of the countable assets in the trust principal if there is any condition under which the principal could be paid to or on behalf of the person from an irrevocable trust.

Count as the person's countable asset the value of the trust's countable income if there is any condition under which the income could be paid to or on behalf of the person. . . .

Bridges Eligibility Manual 402

[page 4]

. . . .

Initial Eligibility Formula

SSI-Related MA

The formula for asset eligibility is:

- The value of the couple's (his, her, their) countable assets for the month being tested.

- **MINUS** the protected spousal amount (see below).
- **EQUALS** the client's countable assets. Countable assets must not exceed the limit for one person in BEM 400 for the category(ies) being tested.

. . . .

Bridges Eligibility Manual 405

[pages 1–2]

Resource means all the client's and spouse's assets and income. It includes all assets and all income, even countable and/or excluded assets, the individual or spouse receive. It also includes all assets and income that the individual (or their spouse) were entitled to but did not receive because of action by one of the following:

- The client or spouse.
- A person (including a court or administrative body) with legal authority to act in place of or on behalf of the client or the client's spouse.
- Any person (including a court or administrative body) acting at the direction or upon the request of the client or his spouse.

. . . .

INTRODUCTION

Medicaid, a program intended for the truly needy, has limited resources that must be carefully stewarded to afford care to those who are unable to provide for themselves. It is means-tested, and Congress placed strict limits on assets for those who can qualify. But the Hegadorns, Lollars, and Fords (Claimants), who have assets exceeding those limits, want public funds to pay the entire nursing home expense without the need to spend-down their extra assets. And to reach this goal, they misread the statutory language in a way that eliminates an essential part of Congress's plan for couples when one spouse needs nursing home care and one remains at home. Their interpretation would eviscerate means-testing by allowing a community spouse to stash assets, even millions of dollars, in the "right" trust and thus to make it disappear for Medicaid purposes. The Court of Appeals correctly held that Congress did not intend this, and the law and policy do not permit it.

Congress provided explicit instructions to calculate the appropriate amount of assets that the community spouse may keep for his or her basic needs and still permit the institutionalized spouse to meet the means-testing to qualify for Medicaid benefits to pay the nursing home expenses. The assets of *both* spouses, regardless of how they are held, are counted when determining the eligibility of the institutionalized spouse. 42 USC 1396r-5(c). This is consistent with the express purpose of the Medicaid Act (42 USC 1396 *et seq*.): "to provide Medical care to low-income individuals." *Hegadorn v Dep't of Human Servs Dir*, ___ Mich App ____, ___ (2017), citing *Mackey v Dep't of Human Servs*, 289 Mich App 688, 693 (2010).

The applicants for leave to appeal are correct that this case involves a legal principle of significance to the State's jurisprudence. But the Court of Appeals has clearly resolved all those issues in its published opinion. And these Claimants have not demonstrated any of the other required standards for review because they cannot show that the decision is clearly erroneous and will cause material injustice, or that the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals. MCR 7.305(B)(5).

In the end, the Claimants' application should be denied because no error exists to require review by this Court. Alternatively, the Department requests that this Court affirm the Court of Appeals' opinion.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

These consolidated cases involve three couples, each having an institutionalized spouse seeking MA-LTC to pay for nursing home expenses and a community spouse who does not receive Medicaid benefits.

The Medicaid Program for Long-term Care Assistance.

Medicaid is a well-developed, highly structured program intended to fairly distribute taxpayer supported medical care to needy individuals who cannot provide it for themselves. *Wisconsin Dep't of Health & Family Servs v Blumer*, 534 US 473, 480 (2002); *Atkins v Rivera,* 477 US 154, 158 (1986); 42 USC § 1396p. The program is need-based, and Congress placed stringent restrictions on financial eligibility. *Cook v Dep't of Social Servs*, 225 Mich App 318, 320 (1997); *Blumer,* 480 US at 480.

For an institutionalized individual, who has a community spouse and who is seeking Medicaid Assistance for Long-term Care (MA-LTC), the assets of both spouses are calculated to determine if the applicant is eligible for benefits. 42 USC 1396r-5(c)(1) (calculating "total joint resources" as "the total value of the resources to the extent either the institutionalized spouse or the community spouse has an ownership interest"). Medicaid was never intended as a socialized nursing-home subsidy available to all elderly individuals. Rather, both applicants and their spouses must demonstrate financial need and accept the terms of assistance. MCL 400.6(2).

In the Medicare Catastrophic Coverage Act of 1988 (MCCA), codified as the spousal impoverishment provisions of 42 USC 1396r-5, Congress specifically addressed the amount of the couple's income and assets the community spouse could retain and still permit the nursing home spouse to qualify for MA-LTC. *Blumer*, 534 US at 480, citing HR Rep. No. 100-105, pt 2, p 65 (1987). (Exhibit A, CMS[1] Guidelines.) The rules for evaluating assets are found in 42 USC 1396p, which explains divestments at subsection (b) and countable assets in trusts at subsection (d).

Congress specifically acted several times to prevent otherwise ineligible individuals from using "Medicaid planning" maneuvers to preserve their assets and

[1] The Centers for Medicare and Medicaid Services (CMS) is the federal agency in the U.S. Department of Health and Human Services that administers the Medicaid program in all fifty states and American territories. Each year CMS publishes the Spousal Guidelines that state the limits for the program.

still qualify for benefits. *Cook*, 225 Mich App at 322; *Mackey,* 289 Mich App at 694. These statutory changes effectively foreclosed opportunities to use trusts to shield assets from Medicaid scrutiny. "The Medicaid program would be at fiscal risk if individuals were permitted to preserve assets for their heirs while receiving Medicaid benefits from the states." *Ronney v Dep't of Social Servs*, 210 Mich App 312, 319 (1995). Each applicant bears the burden of demonstrating his entitlement to public assistance. *Lavine v Milne*, 424 US 577, 584-585 (1976). And states participating in the Medicaid program risk the loss of federal funding for their programs if they do not comply with all federal law and regulations. 42 USC 1396c; 42 CFR 430.10.

The Claimants transfer assets to a trust and then apply for Medicaid.

Each of these couples had too many assets to qualify the institutionalized spouse for MA-LTC at public expense. 42 USC 1396r-5; (Exhibit A). After the institutionalized spouse began to receiving long-term care, each couple executed an irrevocable Solely for the Benefit of Trust (SBO Trust) to hold the extra assets for the community spouse. Each Trust delayed its first distribution until after the Department had made its eligibility determination because the Claimant planned to argue that the assets were "not available" on the day of the determination and therefore could not count for the application.[2]

[2] Although each Claimant argued this "unavailable" argument, the provision for delay of the first distribution was not actually included in the Hegadorn Trust.

Following federal law, federal policy, and its own policy, none of which had changed in any period applicable to these cases, the Department determined that with regard to the assets funded into these SBO Trusts:

1. No divestment had occurred;
2. All assets were available under law and policy; and
3. All assets were countable assets for an individual whose assets must be counted for the eligibility of the institutionalized individual.

The Claimants appeal to the Michigan Administrative Hearing System.

The Claimants disagreed with the Department's evaluations of the assets in the SBO Trusts as being countable, and, as provided 42 USC 1396r-5(e), each requested a fair hearing from the Department. 42 USC 1396a(a)(3); 42 CFR 431.200 *et seq*.; MCL 400.9. These were held in the Michigan Administrative Hearing System (MAHS), the agency designated to hold hearings for the Department. In each of these Claimants' cases, the presiding Administrative Law Judge determined that:

1. Because each of the Trusts had all necessary SBO characteristics, the transfers of the assets to an irrevocable trust were not *divestments*, 42 USC 1396p(c)(2)(B);
2. The assets in the Trusts were *countable assets* to one of the individuals whose assets must be counted for eligibility, 42 USC 1396p(d)(3)(B); and
3. The assets were available to at least one of the individuals whose assets must be counted for the eligibility of the institutionalized spouses.

The Claimants appealed to the circuit court.

Each couple appealed the MAHS decision to the appropriate circuit court. And in each case, the circuit court overruled the Department and determined that the assets in the Trust were *not* countable assets.

The Department appealed to the Court of Appeals, which reversed the circuit courts' decisions and reinstated the administrative hearing decisions.

The Department appealed to the Court of Appeals, arguing that the circuit courts had erred in finding that the Claimants' trust assets were not countable assets for determining Medicaid eligibility.

The Court of Appeals, in an unpublished per curiam opinion, reversed the circuit court decisions and reinstated the administrative hearing decisions finding that the assets placed by the institutionalized individual and/or community spouse into an SBO Trust are countable assets for determining whether the institutionalized individual is eligible for Medicaid benefits. After a request by the Department, this opinion was approved for publication on July 27, 2017.

The Claimants filed an application for leave to appeal with this Court.

On July 13, 2017, the Claimants filed an application for leave to appeal with this Court. In the application, the Claimants reiterate the arguments made to the Court of Appeals and argue to this Court that the decisions of the Department, the administrative tribunal, and the Court of Appeals were wrong.

ARGUMENT

I. The Court of Appeals did not err in concluding that the assets in the SBO Trusts of a community spouse were countable assets for the eligibility determination of Medicaid Long-term Care benefits for the institutionalized spouse.

Medicaid is a limited pool of resources that must be carefully administered to afford care to people truly in need. Congress clearly and deliberately set out the plan for evaluating the assets of both spouses for the Medicaid eligibility of the institutionalized spouse—a plan that Congress determined would leave community spouses an adequate amount of income and resources for their needs. *Blumer,* 534 US at 480. These Claimants had more assets than Congress's plan allowed.

To circumvent Congress's express requirements, these Claimants have conflated and confused various portions of law. Their approach, if accepted, would create a loophole that would allow community spouses to retain *any* amount of assets, no matter how large, and would place the full burden of their nursing home expenses on taxpayers, even when the couple can well afford to contribute.

A. Standard of Review.

Questions of statutory construction are reviewed de novo. *Feyz v Mercy Mem Hosp,* 475 Mich 663, 672 (2006). "The Legislature is presumed to have intended the meaning it plainly expressed, and clear statutory language must be enforced as written." *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 219 (2007); *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170, 174 (2007).

B. The Court of Appeals correctly determined the law and its effect on Medicaid policy.

Congress deliberately chose "to unambiguously require States to count trusts against Medicaid eligibility." *Lewis v Alexander*, 685 F3d 325, 343 (CA 3, 2012). "Its primary objective was unquestionably to prevent Medicaid recipients from receiving taxpayer-funded health care while sheltering their own assets for their benefit and the benefit of their heirs." *Id.*; *Cook*, 225 Mich App at 322; *Mackey,* 289 Mich App at 694; *Ronney*, 210 Mich App at 319.

1. The transfer of assets from one spouse to a SBO Trust for his or her spouse is not a divestment, and the Department did not deny eligibility for divestment or assess divestment penalties for these SBO Trusts assets.

Each of the three couples in these consolidated cases sought Medicaid Assistance for Long-term Care benefits for the wife, who was the institutionalized individual. And each couple had too many assets to permit her to qualify for MA-LTC without spending down to an amount permitted by the federal guidelines. (Exhibit A.) So each couple executed an irrevocable SBO Trust for the husband, the community spouse, and funded their excess assets into those SBO Trusts.

Generally, a transfer of assets to an irrevocable trust is considered a divestment, or a giving away of assets for less than fair market value. 42 USC 1396p(c)(1). But spouses are permitted to transfer freely between themselves without divestment issues because the assets of both are counted to see if they are above the asset limit—it doesn't matter who holds them. 42 USC 1396r-5(c)(1). Thus, 42 USC 1396p(c)(2)(B) states that transfers to an irrevocable trust will not

incur a divestment penalty *if* it is transferred so that no one other than the spouse can benefit. These are the "Sole Benefit of" (SBO) provisions, and they require that any SBO Trust must (1) be irrevocable, (2) make payments to no one other than the spouse, and (3) provide that all assets of the Trust be paid out to the spouse within his or her lifetime. Assets transferred to trusts with these characteristics will not be considered *divestments*. 42 USC 1396p(c)(2) & (c)(2)(B) ("by reason of paragraph 1"). Thus, the Department correctly determined that no *divestment* occurred in the transfer of assets to the SBO Trust of a spouse. (Claimants' Br, p 4.)

Section 1396p(c)(2), however, says nothing about countable or excess assets. It addresses *only* the transfer of assets and potential *divestment* penalties for that transfer. SBO provisions apply *only* to divestment issues and, for every other purpose, the Hegadorn, Lollar, and Ford Trusts were simply irrevocable Medicaid trusts holding the countable assets of either or both spouses. 42 USC 1396r-5(a). The Department determination did not find divestment—it determined that the assets in the SBO Trusts were *countable* and that these couples all had excess assets so the institutionalized spouse could not qualify for MA-LTC. The Court of Appeals correctly affirmed the Department determinations.

2. A delay in the first distribution from the SBO Trusts did not make the assets in the SBO Trusts uncountable or unavailable for Medicaid eligibility purposes.

In an effort to make their excess assets unavailable, the Lollar and Ford Trusts were both written so that the first distribution from the Trusts could not be made until after the Department had issued its determination on the eligibility of

the applicant spouse.[3] Contrary to the Claimants' assertions, this provision did not render the assets uncountable for the Medicaid eligibility determination.

Claimants' "unavailable" argument has no basis in law or policy. It is true that some assets may not be countable if they are truly unavailable. This includes, for example, jointly owned real property that a co-owner refuses to sell. But policy is very clear that this does *not* apply to trusts. Bridges Eligibility Manual (BEM) 401, p 9. And federal law for assets in general, as well as in trusts, is clear:

> The term "assets", with respect to an individual, includes all income and resources of the individual *and of the individual's spouse*, including any income or resources which the individual or such individual's spouse is entitled to but does not receive because of action—
>
> > **(A)** by the individual *or such individual's spouse*.
> > [42 USC 1396p(h)(1) (emphasis added).]

Here, these applicants and spouses had complete access and control over all assets until they voluntarily chose to fund them into the Trusts. Any minimal limitation on access was by action of one of the spouses, and therefore the asset is still countable. 42 USC 1396p(h)(1). 42 USC 1396p(d)(2)(C), Treatment of Trust Amounts, is even clearer: that subsection applies "without regard to—**(iii)** any restrictions on when or whether distributions may be made from the trust." Because each of the Trusts in this case required, by their express provisions, that all assets in the Trust be paid out to the community spouse within his expected life

[3] It was clear from the MAHS and circuit court briefs that the Hegadorn Trust also was supposed to have a provision like this, but it was apparently omitted in its drafting and execution.

time (a condition of any SBO Trust), any minor limitation in the time of the first payment did not make the assets in the Trust disappear for Medicaid asset eligibility. 42 USC 1396p(d)(2)(C). The Court of Appeals correctly held that the Trust assets were countable for the eligibility determination of the institutionalized spouse because they were a countable asset of either or both spouses.

3. Trust provisions of 42 USC 1396p(d) clearly and plainly explain trust policy and the countability of trust assets for *any* individual whose assets must be counted for a Medicaid determination of asset eligibility.

42 USC 1396p(d) is the Medicaid Act's statement of its treatment of trust policy for assets. These provisions apply to many, many different Medicaid and benefits programs and give general explanations for all possible applications. When calculating eligibility for benefits, certain individuals' income or assets may need to be calculated for one type of application or benefits programs but not for another. For example, a parent's assets may be counted when calculating a child's eligibility for benefits, and the community spouse's assets are counted for an institutionalized individual's eligibility for MA-LTC. 42 USC 1396r-5(a). For this reason, the statute explains how to assess assets for *any* individual whose assets must be counted for a specific type of application or benefit.

The Claimants assert that the only person whose trust can be evaluated under 42 USC 1396p(d) is the institutionalized individual, regardless of the type of program. (Claimants' Br, §§ II and III.) Their argument is that the term "individual" in § 1396(d) applies *only* to "institutionalized individual," and this of

course eliminates any possibility of using the statute's instructions to evaluate the trust assets of anyone else whose assets, including trust assets, must be counted for an eligibility determination. This contradicts Congress's plan that the assets of both spouses be counted, 42 USC 1396r-5(a), and the plain language of 42 USC 1396p(d), which explains the treatment of trusts and trust assets for all Medicaid programs where trust assets must be evaluated for eligibility.

In 42 USC 1396p, Congress specifically defined "institutionalized individual" and "non-institutionalized individual" in the Definitions section at § 1396p(h)(3) and (4). And throughout that statute, Congress deliberately used the term "institutionalized individual" eleven times and the term "noninstitutionalized individual" six times, when it intended to specifically refer to them. There is no reason to believe that Congress was "hiding the ball" and trying to confuse readers. Because Congress went to the trouble to define "institutionalized individual," it may safely be assumed that its use of the term "individual" in its common usage was intended where it is used. *Majurin v Dep't of Soc Services*, 164 Mich App 701, 706 (1987). And Congress's decision *not* to use that specific, defined term ("institutionalized individual") in 42 USC 1396p(d) confirms that it did not intend that narrow definition, but instead intended the broader reach of common word "individual." After all, in ordinary English, a spouse is an individual, even if not institutionalized. See, e.g., Dr. Seuss, *Horton Hears a Who!* (Random House, 1954) ("A person's a person, no matter how small.").

4. 42 USC 1396p(d)(1) in Treatment of Trusts, refers to the applicant as the trust owner, but it is referring only to (d)(4) trusts, usually known as Special Needs or Supplementary Needs trusts.

Section (d)(1) explains how (d)(4) trusts (Special Needs Trusts) are evaluated for their beneficiaries and explains that the rules in (d)(3) do apply. The Special Needs Trusts (SNT) of § 1396p(d)(4), by definition, can benefit *only* the individual seeking benefits. SNTs are trusts of individuals who are under the age of 65, disabled under the standard of 42 USC 1382c, and have put their own assets—usually settlements from personal injury litigation—into a special type of trust. If the trust has all the necessary SNT characteristics, including payback provisions for Medicaid, the assets are not counted for eligibility for benefits including Medicaid, SSI, and food assistance.

The Claimants in this case do not have qualifying Special Needs Trusts, are not under the age of 65, and do not qualify under this very specific section of law, usually intended for injured children who will have very special needs during their lifetime. 42 USC 1396p(d)(1) does not apply to them.

Section (d)(1) is specific to SNT beneficiaries. General instructions for all other trust and beneficiaries begin at § (d)(2). And again, the more general instructions count all assets, including trusts created solely for the benefit of a spouse.

5. 42 USC 1396p(d)(2) in Treatment of Trusts, explains trust policy generally for any individual whose trust assets must be evaluated for eligibility for benefits.

42 USC 1396p(d)(2)(A) provides that an individual is considered to have established a trust if either or both spouses contribute assets to the trust in any way, either directly or with the assistance of "a court or administrative body." 42 USC 1396p(d)(2)(A).

For the Medicaid program, in evaluating any trust established by either the institutionalized spouse or the community spouse, or any other individual whose assets must be calculated for a determination for benefits, the analysis is the same. The assets in a trust benefitting an individual are reviewed to determine whether some or all of the assets in that trust are considered countable assets. In the case of a trust benefitting an individual with a spouse, any assets contributed by one or both spouses are evaluated.

42 USC 1396p(d)(2)(B) explains that any portion of the trust that can benefit the individual who is the beneficiary is countable for any eligibility determination for which his or her assets are counted. The instructions are clear that if an individual can receive payment from the trust "under any circumstance" the assets from which those payments could be made are resources (i.e. countable assets) for that individual, for any application for which his or her assets are considered.

> **(B)** In the case of an irrevocable trust—
>
> > **(i)** if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the

> individual could be made shall be considered resources available to the individual. [42 USC 1396p(d)(2)(B).]

Each of the Trusts at issue in these consolidated cases was irrevocable and provided that all the assets in the trust *must* be paid out to the community spouse over his expected lifetime or sooner. Thus, those Trust assets are countable (i.e. resources) for the community spouse, who of course is a person whose assets had to be counted for the application for benefits for each of the institutionalized individuals. 42 USC 1396p(d).

Claimants' proffered interpretation, which would eliminate asset or trust evaluation for any community spouses, appears to have only one benefit—evading evaluation of the community spouse's assets. This is clearly not in keeping with Congress's goal of counting all assets of both spouses. And 42 USC 1396r-5(a)(1) is clear that its provisions supersede any provisions of the Medicaid Act that conflict with it.

The Claimants' purported "experts" have conflated and confused the Medicaid policies for divestment and countable assets. (7/14/17 Claimants Br, pp 4-5.) These "experts" explain divestment and then leap to state that any such assets will not be considered resources (countable assets). (7/14/17 Claimants Br, pp 4-5.) This is a totally unwarranted, unexplained, and incorrect conclusion that conflicts with the federal statute.

II. The Court of Appeals did not err when it concluded that individuals who have too many assets to qualify are not entitled to receive Medicaid benefits based on the Department's past mistake in interpretation of state and federal authority.

Claimants bear the burden of proving their entitlement to government benefits in all respects. *Lavine*, 424 US at 583. And a past error in the Department trust evaluation process cannot be the basis for currently granting benefits to these Claimants who do not qualify under the plain language of law and policy.

A. Standard of Review.

"When reviewing the decision of an administrative agency for substantial evidence, a court should accept the agency's findings of fact if they are supported by that quantum of evidence. A court will not set aside findings merely because alternative findings also could have been supported by substantial evidence on the record." *In re Payne*, 444 Mich 679, 692 (1994). See *Arkansas v Oklahoma,* 503 US 91, 109 (1992).

B. Claimants are not entitled to Medicaid benefits due to excess assets of either or both spouses.

Congress set out in explicit detail the steps to determine the appropriate amount of assets that a couple could have and still qualify for MA-LTC. 42 USC 1396r-5. In evaluating any assets held in trust for one or both spouses, the Department determines whether those assets count as divestments that incur a penalty period, 42 USC 1396p(c), or whether they are countable assets, which, if over the published limit, makes the institutionalized individual ineligible for

benefits. 42 USC 1396p(d). These three couples all had too many countable assets. And even though they attempted to evade the Medicaid limits by putting those excess assets into Trusts for the community spouse, those assets nevertheless disqualified the institutionalized spouse for MA-LTC benefits.

1. The Claimants are not entitled to Medicaid benefits and therefore cannot receive them based on the Department's prior, erroneous interpretation of policy and law.

In August 2014, the Department became aware of an error in its trust evaluation process for assets in a certain type of trust when determining eligibility for the MA-LTC program. That error in trust evaluation had permitted some individuals to qualify for MA-LTC despite having excess assets in a trust for the community spouse. The Department reviewed its trust evaluation procedures and circulated a memorandum clarifying the process and immediately eliminating the error. There was no change in law or policy. The correction just brought the Department trust evaluation process into compliance with law, regulation, and its own written policy.

These Claimants assert that because the Department made mistakes in the past, it must continue the error to give them benefits they are not entitled to. Their argument, in essence, is to say that if an agency mistakenly misreads a statute once, it must forever continue repeating that mistake. The Court of Appeals disagreed with them and found that the Claimants had not offered any basis to require that benefits be given to those who clearly did not qualify due to excess assets. *Hegadorn*, slip op at 9. The Court explained:

> [T]he plaintiffs and amicus do not cite, and we are unable to find, any authority to support the proposition that individuals who are not entitled to Medicaid benefits should nevertheless receive them based on an alleged change in interpretation of applicable state and federal authority. [*Id.*]

The *Hegadorn* Court also determined that the cases cited by the Claimants, despite similar scenarios, all involved situations in which the individuals actually were eligible for the benefits, "not situations where a person was denied benefits that they were not entitled to." *Id.,* citing *Tompkins v Dep't of Social Servs*, 97 Mich App 218 (1980). "Accordingly, we see no reason to retroactively apply the previous interpretation under the facts and circumstances of this case." *Id.*, slip op at 9-10. The Court of Appeals did not err in concluding that individuals, who are not eligible for Medicaid benefits due to excess countable assets, should not get them.

In fact, if the Department grants benefits to ineligible individuals, Michigan's Medicaid program could be at risk. The Department is required by federal law to comply with all federal law and regulation in the administration of its Medicaid program, 42 USC 1396a; or risk loss of federal funds. 42 USC 1396c; 42 CFR 430.30. The Department *must* adjust its process if it discovers error and in fact "is free to change its policies with regard to medical assistance as long as the changes comport with state and federal law." *In re Kurzyniec Estate*, 207 Mich App 531, 538 (1994). This includes making the adjustment or correction effective immediately. *Id.* The Department cannot knowingly make a determination that conflicts with federal law. But that is what these Claimants are asking for.

The Court of Appeals appreciated that the Department is not free to apply policy it knows to be wrong. "[T]here could be severe consequences statutorily

imposed on the Department should it choose not to comply with the federal requirements." *Hegadorn*, slip op at 9; 42 USC 1396c.

Claimants, however, disregard the hammer that the federal government wields in the Medicaid program. CMS continually monitors the Department's administration of the Medicaid program. And states participating in the Medicaid program risk the loss of federal funding for their programs if they do not comply with all federal law and regulations. 42 USC 1396c; 42 CFR 430.10. If CMS concludes that the Department paid funds incorrectly, or that it is not in compliance with federal law, federal funding could be withdrawn. See 42 USC 1396b(d)(2)(A); 42 USC 1396c; 42 CFR 430.30. This would decimate Michigan's Medicaid program.

2. The Claimants were not eligible for Medicaid benefits when the Department determined their eligibility for Medicaid benefits.

Claimants attempt to bolster their argument by citing the case of *In re D'Amico Estate*, 435 Mich 551, 562 (1990), a case where this Court addressed a state lottery winner's right to a lottery prize under principles of contract law. Claimants' reliance on the *D'Amico* case is misplaced.

In *D'Amico*, this Court recognized "that an administrative agency having interpretive authority may reverse its interpretation, but its new interpretation applies only prospectively." *D'Amico*, 435 Mich at 552. The problem with Claimants' argument is that the Department did follow *D'Amico*. The Department did not apply its correction retroactively or deny *previously granted* Medicaid applications. Each of the Medicaid eligibility determinations for the

institutionalized individuals in these consolidated cases were made *after* the Department corrected its policy. Each of the determinations were correctly made under all applicable law and policy. And the Court of Appeals correctly recognized that there is no legal authority to support Claimants' assertions that individuals, who are not entitled to Medicaid benefits, should nevertheless receive them based on "an alleged change in interpretation." *Hegadorn*, slip op at 9.

CONCLUSION AND RELIEF REQUESTED

In their application for leave to appeal, these Claimants fail to demonstrate clear error, a manifest injustice, contrary court opinions, or a legal principle of jurisprudential significance to Michigan law necessary to warrant further appellate review. Accordingly, the Department requests that this Court affirm the decision of the Court of Appeals or deny the Claimants' application for leave to appeal.

Respectfully submitted,

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